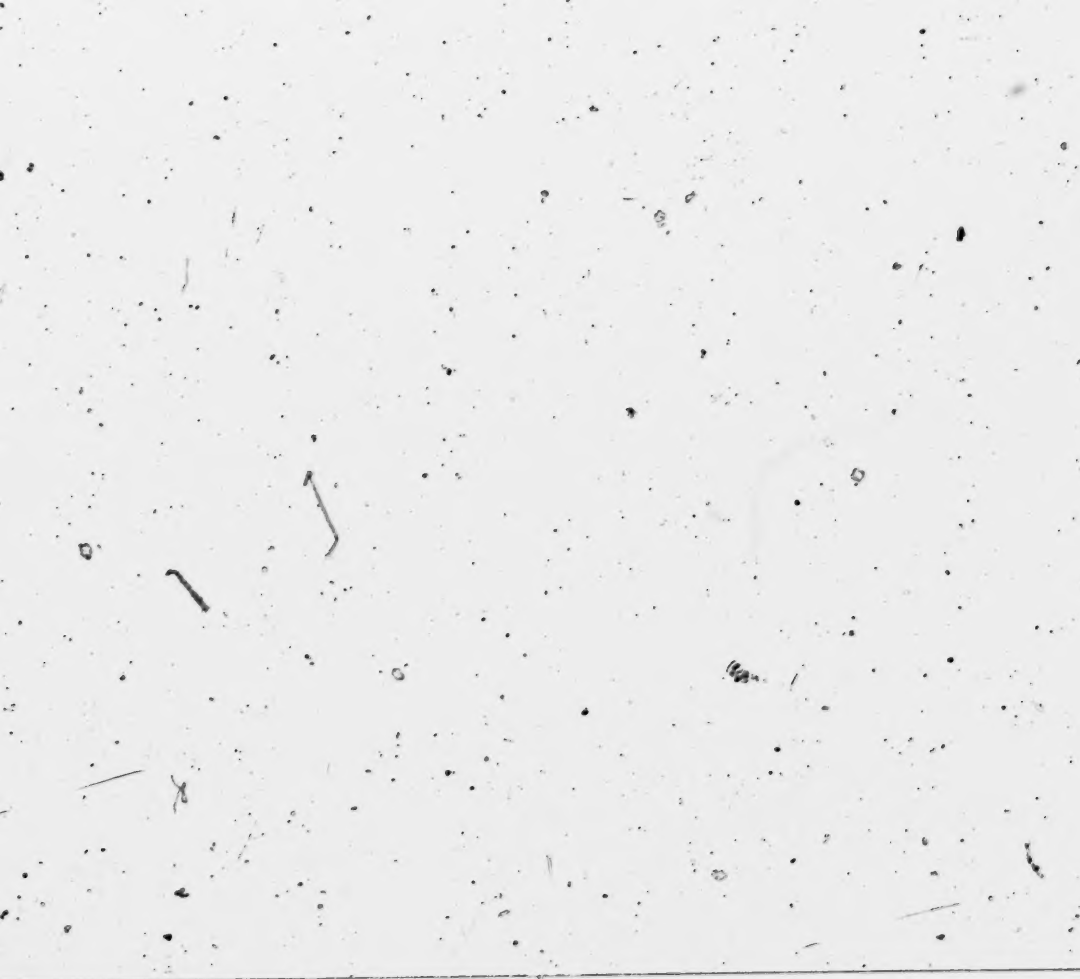

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 421

GOYA FOODS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 3a–4a) is reported at 303 F. 2d 442. The Board's decision and order (B.A. 2–11)[1] are reported at 132 NLRB 572.

JURISDICTION

The decision of the court of appeals was rendered on May 29, 1962 (Pet. 3a–4a), and a decree enforcing the Board's order was entered on June 13, 1962 (Pet. 1a–2a). The petition for a writ of certiorari was filed

[1] "B.A." refers to the appendix to the Board's brief in the court below.

on September 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's offer to reinstate, as independent brokers instead of salesmen, employees who had previously been discriminatorily discharged was motivated by a desire to thwart their organizational efforts.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*), are set forth at pages 5a–6a of the petition.

STATEMENT

A. THE BOARD'S FINDING OF FACT

In early 1960, petitioner, a wholesale grocer specializing in Puerto Rican foods, employed 12 salesmen in the New York area, all of whom had the entire city as a common territory (B.A. 14, 16; 132–133, 158–159). On February 26, the salesmen communicated with the Union,[2] and about March 28 Union Representative Price advised petitioner's president, Charles Unanue, that all but two of the salesmen had joined the Union (B.A. 18–19; 87, 130–131). Unanue immediately called a meeting of the salesmen and told them that, if they organized, petitioner might bring in salesmen from Puerto Rico, move the business to New Jersey, close it, sell directly to customers with-

[2] Local 138, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

out using salesmen, or employ an independent brokerage house to make its sales (B.A. 23–25; 89, 124–125). During March and April, petitioner's officers further interrogated and threatened salesmen in connection with the Union campaign, and promised them benefits if they abandoned the Union (B.A. 25–29; 92–93, 104–107, 176–177).

On April 5, President Unanue consented to a Board election, to be held on April 18, to determine if the salesmen wanted the Union (B.A. 58; 199, 220–221). On April 12, however, Unanue called another meeting of the salesmen, at which he directed them to turn in all petitioner's property (B.A. 34–37; 84–85, 108–109, 121). Unanue then told the salesmen that, because of the trouble resulting from union organization, he was discharging all the salesmen, and invited them to submit written applications for positions as "independent brokers," each of whom would have an exclusive territory (*ibid.*). Four of the salesmen responded to the invitation and were returned to work without executing brokerage contracts (B.A. 4, 36; 185–186).

On April 18, the Board conducted the election as scheduled. The Company challenged the ballots of all the salesmen, including the four then employed as "independent brokers," on the ground that they had been "discharged for cause" (B.A. 32; 200–201, 219–220).

On April 20, the Union and eight salesmen who had declined to apply for positions as "independent brokers" filed unfair labor practice charges against the Company (B.A. 37; 94–110). Later that day,

Union Representative Price arranged a meeting with President Unanue, at which he told Unanue that he felt responsible for costing the men their jobs and that he would back out and leave Unanue to work out something with the discharged salesmen (B.A. 38; 94–95, 187–188).[3] Unanue thereupon gave the salesmen applications for positions as "independent brokers," stating that he would accept four of the men as brokers immediately and hoped to take on the remainder later (B.A. 38–39; 95–96, 111–112, 188–191). The salesmen took the applications but returned them a few minutes later, saying that they did not wish to return unless Unanue would take them all back. Unanue refused and the men left (B.A. 39; 96, 112, 191–192).[4]

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company had violated Section 8(a)(1) of the Act by coercively interrogating its employees concerning their union activity, and attempting, through threats and promises of benefit, to force them to abandon the Union. The Board further found that the Company's change from a salesman to an independent broker-arrangement was made for the purpose of defeating the organizational rights of the salesmen. Accordingly, the Board found that the Company discriminated in violation of Sec-

[3] The next day the Union withdrew its unfair labor practice charge and its petition for election (B.A. 212–213). The withdrawal of the petition was approved without resolving the challenges to the ballots.

[4] One of the salesmen applied for a broker's position the next day (B.A. 39–40).

tion 8(a)(3) of the Act by discharging its seven salesmen and offering to reemploy them as brokers. (B.A. 2–4, 52–54, 55–61.)

The Board's order (B.A. 5–8) required the Company to cease and desist from the unfair labor practices found and from interfering with its employees' rights under the Act in any other manner. Affirmatively, the order required the Company, in addition to posting the usual notice, to offer the seven discriminatees reinstatement and back pay.[1]

THE DECISION OF THE COURT OF APPEALS

The court of appeals concluded that the Board's unfair labor practice findings were supported by substantial evidence, and enforced the Board's order in full (Pet. 3a–4a).

ARGUMENT

1. Petitioner does not contest the Board's finding that it discharged its seven salesmen on April 12, 1960, for the purpose of defeating their organizational efforts, but asserts that the Board erred in holding it liable for back pay after April 20. It is petitioner's position that, on that date, it made a *bona fide* offer to take back those salesmen for whom work was then available as independent brokers, and that the salesmen rejected this offer unless all of them could return, thereby becoming economic strikers (Pet. 4). Petitioner's position is contrary to the Board's finding, which was sustained by the court of appeals:

[1] Since it appeared that the Company required less salesmen than before, the Board's order provided for the nondiscriminatory allocation of the available jobs among the seven discriminatees (B.A. 68–69).

The Board found (B.A. 61), and the court of appeals agreed (Pet. 4a), that the offer of April 20 was not *bona fide*, but was motivated by the same illegal considerations which prompted the discharge on April 12; *i.e.*, the salesmen were offered work as independent brokers in an effort to remove them from the protection of the Act[6] and thus impede their organizational efforts. In these circumstances, the salesmen were not required to accept the offer, and their failure to do so cannot toll petitioner's back pay liability.

2. Accordingly, the sole question presented is whether substantial evidence supports the Board's finding that the offer of April 20 was illegally motivated. A question of this kind, turning as it does on the facts of this particular case, does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the Board was fully warranted in finding that the discharge of the salesmen and the offer to reengage them as independent brokers was motivated by anti-union considerations. This action followed on the heels of a program of restraint and coercion violative of Section 8(a)(1) of the Act; the men were discharged six days before a scheduled Board election; petitioner invoked the discharge to challenge their right to vote; the four salesmen, who meanwhile accepted jobs as independent brokers, were not required to execute a brokerage con-

[6] Section 2(3) of the Act exempts "independent contractors" from the definition of "employees" subject to the Act.

tract but were simply reassigned to specific territories; and, indeed, President Unanue, in announcing the discharges, stated that the change to independent brokers was being made because of the salesmen's union activity (pp. 2–3, *supra*). These circumstances furnish ample basis for the Board's finding. Nor is a different conclusion required by the fact that petitioner had, for economic reasons, previously decided to change from general to exclusive sales areas, which, ultimately, would require fewer salesmen (B.A. 56–57, 68–69). The Board found (B.A. 3–4), and the court below agreed (Pet. 4a), that the changeover to exclusive sales areas could have been accomplished without the device of discharge and recall as independent brokers, and that the arrangement resorted to was used solely as a means of thwarting the Union.

The fact that the independent brokerage arrangement was illegally motivated distinguishes this case from *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (C.A. 5) and the related cases cited by petitioner (Pet. 8). There the courts found that the change in operations was motivated by economic considerations. Similarly, accepting the Board's finding of illegal motivation, a causal connection between petitioner's unfair labor practices and the employees' refusal of its offer of reemployment obviously exists, and there is no such problem as was presented in *National Labor Relations Board* v. *Scott & Scott*, 245 F. 2d 926 (C.A. 9) (Pet. 5).

Finally, it should be noted that this case is distinguishable from *Bon Hennings Logging Co.* v. *National Labor Relations Board* (C.A. 9), decided September 4, 1962, 51 LRRM 2085, 2090–2093. In that case, finding that the company had discharged its drivers and leased its trucks to a truck foreman in order to defeat a union organizing drive, the Board held that the drivers were not required to accept a subsequent offer of reemployment by the truck foreman because, *inter alia*, it would have required them to acquiesce in the discriminatory lease arrangement. The court, although sustaining the Board's finding that the lease arrangement was discriminatory, remanded the case to the Board for further findings with respect to the validity of the offer of reinstatement. In the court's view, the Board's conclusion that the offer was not *bona fide* appeared to rest on the assumption that the truck foreman, in making the offer, was not acting as agent for the original employer, and that the jobs which he offered were not equivalent to those which the drivers formerly had. The court held that, on the record before it, those assumptions could not be sustained. There is no comparable ambiguity here; it is clear that petitioner did not offer to reemploy the men as salesmen, but simply renewed its illegally motivated offer to engage them as independent brokers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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